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COURT OF CRIMINAL APPEALS
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No. PD-0257-21

IN THE COURT OF CRIMINAL APPEALS

OF THE STATE OF TEXAS

FILED
COURT OF CRIMINAL APPEALS
11/3/2021
DEANA WILLIAMSON, CLERK

DANNA PRESLEY CYR, Appellant

v.

THE STATE OF TEXAS, Appellee

Appeal from Gaines County

* * * * *

STATE'S BRIEF ON THE MERITS

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Stacey M. Soule
State Prosecuting Attorney
Bar I.D. No. 24031632

John R. Messinger
Assistant State Prosecuting Attorney
Bar I.D. No. 24053705

P.O. Box 13046
Austin, Texas 78711
information@spa.texas.gov
512/463-1660 (Telephone)
512/463-5724 (Fax)

ORAL ARGUMENT REQUESTED

NAMES OF ALL PARTIES TO THE TRIAL COURT'S JUDGMENT

*The parties to the trial court's judgment are the State of Texas and Appellant, Danna Presley Cyr.

*The case was tried before the Honorable Jay Gibson, Senior Judge, 106th District Court, sitting in Ector County, Texas.

*Counsel for Appellant in the trial court was David Guinn, Hurley & Guinn, 1805 13th Street, Lubbock, Texas 79401.

*Counsel for Appellant on appeal and before this Court is Paul E. Mansur, 114 S. Main St., Seminole, Texas 79360.

*Counsel for the State at trial was Philip Mack Furlow, 106th Judicial District Attorney, David Fulton, Assistant District Attorney, and Jennifer Basset, Appointed Special Counsel, Gaines County District Attorney's Office, P.O. Box 1124, Lamesa, Texas 79331.

*Counsel for the State on appeal was Charles M. Mallin, Assistant District Attorney, P.O. Box 1124, Lamesa, Texas 79331.

*Counsel for the State before this Court is John R. Messinger, Assistant State Prosecuting Attorney, P.O. Box 13046, Austin, Texas 78711.

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* * * * *

STATE'S BRIEF ON THE MERITS

* * * * *

TO THE HONORABLE COURT OF CRIMINAL APPEALS:

Injury to a child can be caused by omission because the law creates a duty to protect your child from another person's abuse. That is, the law makes the parent responsible for the injury she recklessly allows that other person to cause. When that happens, there is no concurrent cause of the injury.

STATEMENT OF THE CASE

Appellant was convicted of recklessly causing serious bodily injury to a child by either failing to protect her daughter from her husband or failing to seek reasonable medical care for her daughter after her husband injured her. The court of appeals reversed because appellant was denied an instruction on concurrent causation based upon her husband's conduct.

STATEMENT REGARDING ORAL ARGUMENT

The Court granted the State's request for oral argument.

ISSUES PRESENTED

1. **Does the concept of concurrent causation, TEX. PENAL CODE § 6.04(a), apply to the results caused by third parties for which the defendant is criminally responsible?**

2. **Is ambivalence over the amount of serious bodily injury directly attributable to the defendant evidence that her conduct was clearly insufficient to cause any serious bodily injury?**

STATEMENT OF FACTS

None of the pertinent evidence[1] was contested at trial. What some of it means to the issues at hand is hotly contested on appeal.

The timeline.

The victim, J.D., suffered serious bodily injury when she was four months old.[2] These injuries were precipitated by violent or severe shaking[3] at the hands of her father, Justin, in the living room of their home.[4] Appellant came out of the kitchen

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[1] TEX. R. APP. P. 38.1(g) (requiring a concise statement of pertinent facts).

[2] 4 RR 46, 93.

[3] The pediatric ophthalmologist, Dr. Curt Cockings, testified specifically to the injury to the eyes. 4 RR 37-38, 40, 43 ("She was almost shaken to death."), 45-46, 48. A pediatrician, Dr. Patty Patterson, testified to the brain injuries. 4 RR 86-88, 97

[4] 3 RR 127-29 (one of J.D.'s sisters witnessed Justin "choking" J.D.), 142, 145 (J.D.'s other sister saw Justin "choke" J.D.)

and told him to stop hurting J.D.[5] Depending on which parent spoke to officials, J.D. was either lethargic with her eyes rolled back in her head but fine twenty minutes later,[6] or "became limp and began having body spasms."[7] J.D. was fussy throughout the night and was screaming and throwing her arms around the following morning.[8]

At 10:00 or 10:30 a.m., appellant told her mother they were headed to a Lubbock hospital because she believed J.D. had "a seizure."[9] Her mother told appellant to go to a nearby hospital immediately.[10] Covenant Medical Center in Lubbock is 75 miles from J.D.'s home.[11] At least three medical facilities are closer, including one six miles from J.D.'s home.[12] J.D. was thrashing and flailing so badly by the time appellant had passed the third facility that appellant had scratches on her neck from trying to hold her.[13] J.D. was admitted to Covenant at 2:10 p.m., roughly

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[5] 3 RR 127-29, 135.

[6] 3 RR 42-43 (appellant's story to a CPS special investigator).

[7] 3 RR 83.

[8] 3 RR 43.

[9] 3 RR 173-174.

[10] 3 RR 176.

[11] 3 RR 176.

[12] 3 RR 176 (Denver City's is six miles), 180-81 (Brownfield Regional Medical Center is on the way to Lubbock); 4 RR 112 (Seminole Memorial Hospital is twenty minutes from J.D.'s neighborhood), 117 (Brownfield's hospital is thirty minutes from Denver City).

[13] 3 RR 180-81.

three hours after appellant was told to seek immediate care and 18 hours after the shaking event.[14]

The injuries.

J.D.'s injuries included near-total loss of vision in her left eye and partial loss in her right[15] due to "hemorrhages everywhere,"[16] and extensive brain damage[17] and severe lack of brain development.[18] The mechanism for J.D.'s brain injury has multiple components. A baby's brain is soft and there are many small, fragile blood vessels attached to it.[19] Shaking causes the brain to impact the inside of the skull.[20] The impact injury causes the brain to swell and also stretches the blood vessels.[21] The risk that these blood vessels are ruptured is increased in babies, as their heads wobble

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[14] 3 RR 42-43 (appellant saw signs of injury "Saturday night," June 29, 2013), 83 (Justin a chief deputy J.D. "became limp and began having body spasms" between 7:30 and 8:00 p.m. Saturday), 3 RR 29-30 (check-in time); 12 RR 4 (State's Ex. 3 p.1, admission date of June 30, 2013, at 2:10 p.m.).

[15] 4 RR 44-45.

[16] 4 RR 34, 37, 39.

[17] 4 RR 73-75.

[18] 4 RR 79-80 (explaining J.D.'s lack of brain development in nearly five years since the event); 16 RR 91-92 (slides from State's 14 showing J.D.'s lack of head-circumference growth).

[19] 4 RR 63, 86.

[20] 4 RR 86.

[21] 4 RR 86-87.

and rotate more because of undeveloped neck muscles.[22] J.D. had bleeding around her brain due to broken vessels.[23] The pressure inside the skull cuts off blood flow, which causes more brain damage from lack of oxygen.[24] A baby's skull has some room for expansion because it is not yet fused but that has its limits.[25]

J.D.'s treatment.

J.D. underwent surgery to relieve the swelling.[26] Neurosurgeons installed a drain in her brain and a second to drain spinal fluid, which also flows around the brain, to remove pressure.[27] A nasal cannula was installed to deliver oxygen but Justin ordered it removed.[28] None of the medical facilities bypassed by appellant could have performed neurosurgery but all of them would have stabilized J.D. and arranged a helicopter; she could have gotten to Lubbock in an hour and a half or less.[29] Oxygen would have been administered by at least two of the facilities.[30]

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22 4 RR 86.

23 4 RR 60.

24 4 RR 90.

25 4 RR 90.

26 4 RR 60, 64.

27 4 RR 66, 69, 95-96.

28 4 RR 101.

29 4 RR 106-09, 110-13, 115-17.

30 4 RR 111, 116.

A series of "What if . . . ?" questions.

Dr. Patterson, a pediatrician, was asked numerous specific questions that touched on the relationship between the initial shaking, delayed medical care, and the degree of injury sustained. When asked if immediate medical attention could have lessened the injury, she said the swelling that caused the brain damage possibly could have been stopped, and, rephrased a moment later, that J.D.'s cumulative injury could have been lessened.[31] She agreed upon redirect that it was possible "some of the injuries that this child has or affects of the injuries" could have been mitigated "if the Defendant had taken the victim in this case to any kind of medical care" instead of waiting until the following afternoon.[32] In apparent response to this, defense counsel elicited testimony on re-cross that "possible" just means "possible," not "probable" or "even over 50 percent."[33]

Dr. Patterson further agreed "the injuries inflicted on the victim" constituted serious bodily injury as that term is defined.[34] On cross-examination, she agreed that J.D. would have suffered serious bodily injury in the form of the brain injury, retinal hemorrhaging, and subdural hematoma caused by Justin shaking her even with earlier

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[31] 4 RR 90-91.

[32] 4 RR 99.

[33] 4 RR 102.

[34] 4 RR 93.

surgery.[35] Dr. Patterson also agreed with defense counsel's later reiteration that J.D. would still have serious bodily injury and serious mental deficiency and most likely still would have been near death with earlier surgery.[36]

After being asked about the injuries attributable to the shaking, defense counsel asked a series of questions about whether there is any "greater cause of the injury" or other "independent cause other than shaking for this condition."[37] Dr. Patterson said the shaking and impact of J.D.'s head against an object or her own back caused it.[38]

The questioning of the chief nursing officer at Seminole Hospital was less expansive. He agreed that "stabilizing that child and providing that child with oxygen and other things that [he does] to stabilize could possibly mitigate, maybe, the severity of the injuries."[39]

No one testified that 18 hours of unmitigated cranial swelling or brain bleeding and the related lack of oxygen was clearly insufficient to produce serious bodily injury in a baby.

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[35] 4 RR 96-97.

[36] 4 RR 98.

[37] 4 RR 97.

[38] 4 RR 97-98.

[39] 4 RR 113.

SUMMARY OF THE ARGUMENT

Appellant was not entitled to an instruction on concurrent causation because it was her failure to protect J.D. from Justin that ultimately caused whatever harm he inflicted upon her. When the offense charged makes the defendant responsible for the conduct of another person by design, a concurrent causation defense based on that other person's conduct is untenable.

Alternatively, entitlement to an instruction should require affirmative evidence that, as the statute says, the defendant's conduct was clearly insufficient to produce the result. There is no evidence appellant's 18-hour delay in seeking medical care for J.D. was clearly insufficient to produce serious bodily injury.

ARGUMENT

I. Concurrent causation is rarely applicable.

Causation is usually a simple matter. For some reason, concurrent causation—at least entitlement to the instruction—causes confusion. Before wading into the analysis of this case, it is worth examining the doctrine in the abstract.

I.A. The statute itself.

Texas Penal Code Section 6.04 is entitled "Causation: Conduct and Results." Subsection (a) says, "A person is criminally responsible if the result would not have occurred but for his conduct, operating either alone or concurrently with another cause, unless the concurrent cause was clearly sufficient to produce the result and the

conduct of the actor clearly insufficient."[40] Although it is typically—perhaps always—requested by the defense, concurrent causation is not even nominally a defensive instruction. It is in Chapter 6 (entitled "Culpability Generally"), not Chapter 9. In practice, Section 6.04(a) is essentially an anti-defensive issue because it prevents defendants from shifting blame except under the most extreme circumstances.

Section 6.04(a) has three operative parts. The first part is the "but for" clause. In Texas, all that criminal culpability requires is "a 'but for' causal connection."[41] "But for" is a simple concept: the result would not have happened without the defendant's conduct. As the commentary to Section 6.04(a) says, "One rarely need look beyond th[e "but for"] clause to find the required causal relationship; in fact, common sense assumes the existence of causal connection, because of the unbroken sequence of criminal conduct and resulting harm, in the great majority of criminal cases."[42]

The second part is the "alone or concurrently" clause. It is an addendum to the "but for" clause, and is clear enough on its own. As long as the defendant's conduct

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[40] TEX. PENAL CODE § 6.04(a).

[41] *Robbins v. State*, 717 S.W.2d 348, 351 (Tex. Crim. App. 1986).

[42] S. Searcy and J. Patterson, Practice Commentary, V.T.C.A. Penal Code, Sec. 6.04.

is "a direct cause of the harm suffered . . . it need not be the only cause[.]"[43] It does not matter if "'another cause' in addition to the actor's conduct, [*i.e.*,] an 'agency in addition to the actor[,]'"[44] played a role. This additional rule of causation makes sense as a matter of policy: an actor does not become innocent because another actor or circumstance is also to blame.

The third part, the "unless" clause, is structured as a limit on culpability when there is a concurrent cause. The idea presumably is that there comes a point at which the defendant's conduct, although technically a "but for" cause of the result, is so comparatively weak compared to other causes that criminal liability is unfair. Other States have something similar but draw the line differently. Maine used to have a statute that mirrored Section 6.04(a) but opted to break it up and focus exclusively on the sufficiency of the defendant's conduct.[45] California offers an expanded definition of "but for" causation and requires, in the event of concurrent causes, that the

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[43] *Williams v. State*, 235 S.W.3d 742, 755 (Tex. Crim. App. 2007).

[44] *Robbins*, 717 S.W.2d at 351 n.2 (citing Searcy and Patterson).

[45] *See State v. Peaslee*, 571 A.2d 825, 826 (Me. 1990) (quoting the 1983 version of its causation statute). ME. REV. STAT. tit. 17-A, § 33 now says:

> 1. Unless otherwise provided, when causing a result is an element of a crime, causation may be found when the result would not have occurred but for the conduct of the defendant, operating either alone or concurrently with another cause.
>
> 2. In cases in which concurrent causation is generated as an issue, the defendant's conduct must also have been sufficient by itself to produce the result.

defendant's conduct be a "substantial factor contributing to the result."[46] Both place a higher burden on the State than Section 6.04(a), which requires only that the defendant's conduct not be clearly insufficient to have caused to the result. The double negative is awkward, but it reinforces the policy of maximizing an actor's responsibility for the harm she contributes to. It should be the rare case that a bad actor avoids responsibility because another actor or circumstance is worse.

I.B. Cases show raising concurrent causation is difficult.

"A jury charge on causation is called for only when the issue of concurrent causation is presented."[47] When multiple actors are concerned, that is almost never the case. In *Barnette v. State*, this Court said the instruction was inapplicable because Barnette did not present a concurrent cause of death but an "alternate cause"; he claimed someone else did the shooting.[48] In *McFarland v. State*, another murder case, a concurrent causation instruction was unwarranted because "[f]rom all the evidence

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[46] Cal. Jury Instr.--Crim. 3.40 ("Cause—'But for' Test," which instructs in part, "A cause of the (result of the crime) is an [act] [or] [omission] that sets in motion a chain of events that produces as a direct, natural and probable consequence of the [act] [or] [omission] the (result of the crime) and without which the (result of the crime) would not occur."); 3.41 ("More Than One Cause/Concurrent Cause," which says in part, "When the conduct of two or more persons contributes concurrently as a cause of the (result of the crime), the conduct of each is a cause of the (result of the crime) if that conduct was also a substantial factor contributing to the result."). The California Supreme Court has said "the tests for 'but for' and 'substantial factor' causation usually produce the same result, but the 'substantial factor' standard states a clearer rule that subsumes and reaches beyond the 'but for' test to more accurately address situations in which there are independent concurrent causes of an event." *People v. Jennings*, 237 P.3d 474, 496 (2010).

[47] *Hughes v. State*, 897 S.W.2d 285, 297 (Tex. Crim. App. 1994).

[48] 709 S.W.2d 650, 651 (Tex. Crim. App. 1986).

it appear[ed]" the defendant fired at least one of the three fatal shots.[49] In *Daniel v. State*, a panel rejected entitlement in an intoxication manslaughter case because the decedent standing in the highway did not sever the causal connection between Daniel's driving and the decedent's death.[50] This Court's sufficiency cases do not present an apples-to-apples comparison, but the facts therein also illustrate how difficult it is for a defendant to put the doctrine to use.[51]

Lower courts also take a strict approach to entitlement. For example, in *Fish v. State*, the defendant was convicted of manslaughter for killing his mother with his truck.[52] The Fourteenth Court held Fish was not entitled to an instruction based on his mother's conduct because, "There was no evidence in this case that would enable a rational factfinder to have concluded that the decedent's taking '[a]bout two' steps toward appellant's truck, immediately before being hit and pinned against a brick pillar, was sufficient by itself to cause the decedent's death."[53]

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[49] 928 S.W.2d 482, 515-16 (Tex. Crim. App. 1996), abrogated by *Mosley v. State*, 983 S.W.2d 249 (Tex. Crim. App. 1998). Note that this Court referred to the other gunman as McFarland's accomplice. If the State is correct in this case, McFarland's culpability as a party should have rendered concurrent cause inapplicable as a matter of law.

[50] 577 S.W.2d 231, 235-36 (Tex. Crim. App. 1979) (op. on reh'g).

[51] *See*, *e.g.*, *Thompson v. State*, 93 S.W.3d 16, 20-21 (Tex. Crim. App. 2001), order withdrawn (Feb. 26, 2003) (no evidence that shooting someone in the mouth and nearly severing their tongue is clearly insufficient to cause death); *Felder v. State*, 848 S.W.2d 85, 89 (Tex. Crim. App. 1992) (no evidence that removal from life support and not the stab wound to the temple caused the death).

[52] 609 S.W.3d 170, 176 (Tex. App.—Houston [14th Dist.] 2020, pet. ref'd).

[53] *Id*. at 185-86.

In *Bell v. State*, cited in *Fish*, Bell was convicted for murder for hitting Thompson with his car after Thompson had an altercation with Bell's passenger, Burdick.[54] Bell claimed Burdick caused Thompson's death by opening his door into Thompson as Bell drove past, but was denied a Section 6.04(a) instruction.[55] The Second Court rejected Bell's argument for entitlement. "[A]ppellant presented no evidence that Burdick's act of opening the door, by itself, was sufficient by itself to cause Thompson's death. Absent appellant's act of actually driving the car, there is no evidence that Burdick's act of opening the car door would have caused Thompson's death."[56]

From these cases (and experience), it becomes clear why concurrent causation is rarely an issue when there are two actors who contribute to the result—meeting one or both parts of the test is nearly impossible.[57] That is a good thing, as it shows the

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[54] *Bell v. State*, 169 S.W.3d 384, 388-89 (Tex. App.—Fort Worth 2005, pet. ref'd).

[55] *Id*. at 394-95.

[56] *Id*. at 395.

[57] It comes up often with intoxication manslaughter/assault where the issue is not whether the defendant's conduct was insufficient to cause the result but whether his condition was. *See*, *e.g.*, *Saenz v. State*, 474 S.W.3d 47, 51-52 (Tex. App.—Houston [14th Dist.] 2015, no pet.); *Wooten v. State*, 267 S.W.3d 289, 295-96 (Tex. App.—Houston [14th Dist.] 2008, pet. ref'd); *Morris v. State*, 214 S.W.3d 159, 170 (Tex. App.—Beaumont 2007), *aff'd*, 301 S.W.3d 281 (Tex. Crim. App. 2009); *Hale v. State*, 194 S.W.3d 39, 43-44 (Tex. App.—Texarkana 2006, no pet.). This theory was the reason for Judge Clinton's dissent in *Daniel*, *supra*; he understood Daniel to be challenging the causation element of intoxication rather than driving. 577 S.W.2d at 236. Ironically, it is not clear that Section 6.04(a) should apply to these offenses; intoxication may be the requisite reason for the accident or mistake resulting in injury or death but it is not literally "conduct"—an act or omission, *see* TEX. PENAL CODE § 1.07(a)(10)—to which Section 6.04(a) would apply.

State does not charge people whose conduct is even arguably clearly insufficient to have caused the result. And when it is not an issue, the instruction should not be given. This is so not only because it may serve to confuse the jury but because it would be an improper comment on the weight of the defendant's (inapplicable) defensive theory.[58]

II. Concurrent causation was inapplicable in this case as a matter of law and fact.

The court of appeals made two errors in its analysis of entitlement. First, it failed to see that the doctrine is inapplicable as a matter of law when the charged offense by design makes the defendant culpable for the conduct of the alleged concurrent cause. Second, if the doctrine were theoretically applicable, the court lowered the bar on entitlement by failing to require affirmative evidence that appellant's conduct was clearly insufficient to produce serious bodily injury.

II.A. The risk a defendant criminally disregards cannot be a concurrent cause.

In cases like this, the State typically charges the defendant with the failure to seek medical care for the abuse but not the failure to protect the child from the abuser. Both manners and means result in a second-degree felony when committed

[58] *Cf. Walters v. State*, 247 S.W.3d 204, 212 (Tex. Crim. App. 2007) (explaining when special instructions are permissible and effectively conceding that valid jury instructions are permissible comments on the weight of the evidence).

recklessly,[59] and focusing on the failure to obtain medical care avoids having to contend with the foreseeability of the abuse. In this case, however, the State also alleged appellant's failure to protect J.D. from Justin.[60] This made appellant the cause of the harm he caused J.D. because that is the point of this offense of omission—the defendant failed to protect a child from X and the result was injury. No general principle of culpability can change that. That would do more than violate a canon of construction.[61] It would make no sense.

II.A.1. Courts have addressed this principle in different contexts.

This Court considered an analogous situation in *Barnette*, *supra*. Barnette was tried for murder, reckless injury to a child, and negligent injury to a child stemming from the scalding death of her infant son.[62] The jury was charged on two theories: (1) that appellant intentionally placed the baby in a tub of scalding hot water, or (2) that appellant recklessly or negligently left the baby in a tub of lukewarm water, aware of the risk of the baby turning on the hot water faucet and thereby injuring himself.[63]

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[59] TEX. PENAL CODE § 22.04(e).

[60] 1 CR 5.

[61] *Sims v. State*, 569 S.W.3d 634, 642 (Tex. Crim. App. 2019) (explaining the "general versus the specific" canon); *see also* TEX. GOV'T CODE § 311.026 (in the event of a conflict, special provisions prevail over general ones).

[62] 709 S.W.2d at 650.

[63] *Id*.

The charge included an abstract instruction on Section 6.04(a) but the trial court refused to instruct on its specific application.[64] The court of appeals found no error because Barnette was not entitled to any charge on concurrent causation.[65] This Court agreed.[66] Although the case was decided on the distinction between concurrent and alternative causes, its reasoning illustrates the incompatibility of concurrent causation when responsibility for the conduct of another is inherent in the offense charged:

> As to the counts alleging injury to a child, the facts in appellant's requested charge are consistent with guilt under the State's theory that appellant caused the child's injury because she left him unattended knowing he could reach the hot water faucet. It was certainly not error for the trial court to refuse to instruct the jury to find appellant not guilty if they found to be true facts that would prove her guilty of injury to a child.[67]

The wisdom of this analysis cannot be overstated. When the State charges someone with causing injury to a child by exposure to a criminally unacceptable risk, it can be no defense that it was not the defendant but the realized risk that caused the injury. Barnette could no more blame his infant son than he could the hot water. Similarly, an actor who recklessly combines dangerous animals with children cannot blame the

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[64] *Id*. at 650-51.

[65] *Id*. at 651.

[66] *Id*.

[67] *Id*. (italics in original). This Court used the same "alternative cause" language in *Williams v. State*, 630 S.W.2d 640, 645 (Tex. Crim. App. 1982), to distinguish what would now be called non-statutory manners and means of the defendant causing injury from true concurrent causation.

animal when the inevitable happens.[68] That rule is easily applied in this case. If failing to protect J.D. from Justin recklessly caused J.D.'s injuries, appellant cannot be innocent because Justin caused J.D.'s injuries. A contrary rule would be absurd. It would swallow the offense whole.

The Third Court of Appeals came to a similar conclusion when it rejected the applicability of concurrent causation to prosecution based on party liability. In *Hanson v. State*, the defendant argued "there was absolutely no evidence" he committed any act against the decedent.[69] He was right. But he was tried and convicted as a party under multiple theories contained in Section 7.02.[70] The court of appeals rejected the applicability of concurrent causation because "Appellant was found liable for the acts of Ludwick and Kotaska[; t]here is no question that the acts of Ludwick and Kotaska caused the death of Cavness."[71] As with appellant's theory in this case, that must be the outcome.

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[68] *See Durkovitz v. State*, 771 S.W.2d 12, 14-15 (Tex. App.—San Antonio 1989, no pet.) (lion owner guilty of reckless injury to a child by act); *Traxler v. State*, 712 S.W.2d 268, 269-70 (Tex. App.—Beaumont 1986, no pet.) (indictment for injury to a child by act was not fundamentally defective for failing to allege cause because it alleged the vicious dog Traxler exposed the child to as the manner and means); *Hranicky v. State*, No. 13-00-00431-CR, 2004 WL 1834266, at *15 (Tex. App.—Corpus Christi Aug. 12, 2004, pet. ref'd) (not designated for publication) ("Accordingly, we find that Hranicky's actions, in conjunction with the tiger [he purchased and raised], were the 'but for' causes of Lauren's death" in an injury-to-a-child-by-act case).

[69] 55 S.W.3d 681, 699 (Tex. App.—Austin 2001, pet. ref'd).

[70] *Id*. at 686.

[71] *Id*. at 700.

The Supreme Court of Maine came to a similar result applying a concurrent causation statute that was nearly identical to Section 6.04(a). Peaslee was deliberately fishtailing on a snow-packed, icy road when his car went out of control and overturned, throwing his passenger (Dawson) onto the road.[72] Minutes later, Dawson, too injured to get out of the road, was struck by a second car and died shortly thereafter.[73] That court held concurrent causation inapplicable

> because the separate accidents were not independent of each other. Peaslee was criminally responsible for the second impact as well as the first. On the record before us he could properly be convicted even if the second impact were the sole cause of Dawson's death. . . . Dawson would not have been lying immobile on the road in the path of the other car were it not for Peaslee's conduct.[74]

Again, this logic is inescapable. When the defendant's conduct, be it act or omission, makes her responsible for what happens next, whatever happens next is her fault.

II.A.2. This court of appeals missed this.

The court of appeals approached this case as if there were no allegation appellant had any responsibility for the injuries for which she failed to obtain medical treatment. It based its framework on its own *Wright v. State*, a straight "medical care"

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[72] *Peaslee*, 571 A.2d at 826.

[73] *Id*.

[74] *Id*. at 827.

case.[75] For the foregoing reasons, that court's analysis was flawed from the outset. But it is also worth noting that the causation analysis in *Wright* and cases like it may be incorrect on their own terms.

Wright was alleged to have caused serious bodily injury for failing to provide medical treatment after discovering her daughter had been sexually assaulted.[76] That court considered Section 6.04(a) in its alternative sufficiency review.[77] *Wright* compared cases in which the parent discovered their child was injured and then failed to seek medical treatment.[78] In the cases discussed therein, the inquiry was the same: was there evidence the failure to obtain medical care caused injury (or serious bodily injury) beyond that already suffered by the child?[79] That may be a good rule, but it is unclear why that kind of case involves concurrent causation. If conviction based solely on failure to obtain medical care requires additional discrete harm, the reason for needing medical care—the existing harm—is never a concurrent cause. Neither of the two cases *Wright* compares refer to the doctrine. *Wright* does, citing both

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[75] 494 S.W.3d 352 (Tex. App.—Eastland 2015, pet. ref'd). *Wright* was a sufficiency case but was cited for its characterization of concurrent causation.

[76] *Id*. at 361.

[77] *Id*. at 362.

[78] *Id*. at 362-63.

[79] *Id*. (comparing *Payton v. State*, 106 S.W.3d 326 (Tex. App.—Fort Worth 2003, pet. ref'd), and *Dusek v. State*, 978 S.W.2d 129 (Tex. App.—Austin 1998, pet. ref'd)).

Section 6.04(a) and *Robbins*,[80] but the sufficiency issue presented in *Wright* was resolved on the fact that no *separate* injury was caused by the failure to obtain medical treatment. There is no place for concurrent cause when the analysis hinges on the existence of injury attributable solely to the defendant. That question can be answered by the jury's verdict on the bare elements of the offense.

II.A.3. Conclusion

When a parent has a legal duty to protect a child from injury but recklessly fails to do so, she is responsible for the result regardless of what or who the risk of injury was. If appellant is guilty of failure to protect,[81] concurrent causation is inapplicable as a matter of law. That is what Section 22.04 effectively says. That is what this Court should explicitly say.

II.B. The court of appeals also viewed the evidence incorrectly or under an insufficient standard.

Assuming concurrent causation could apply to a case like this, the doctrine presents a narrow path by design and entitlement to the instruction should be difficult. The evidence in this case does not meet that high bar.

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[80] *Id*. at 362.

[81] The verdict was general. 1 CR 94-95. The court of appeals affirmed the sufficiency of the evidence supporting appellant's failure to seek medical treatment and so declined to address the sufficiency of the evidence supporting her failure to protect. *Cyr v. State*, __ S.W.3d __, 11-19-00041-CR, 2021 WL 746395, at *8 (Tex. App.—Eastland Feb. 26, 2021, pet. granted).

II.B.1. The record should present affirmative evidence of clear insufficiency.

A concurrent causation instruction should require evidence that would permit a rational jury to conclude not that a defendant's conduct did not contribute to the result but that it clearly *could not have produced it*. A jury can always do the former no matter the record based on simple disbelief of witnesses. It should take more than equivocation or unsettled probabilities; it should require some direct, affirmative evidence the defendant's conduct was "clearly insufficient," even if that evidence is weak, contradicted, or impeached. That is effectively the standard this Court applied in *Ferrel v. State* when it used Section 6.04(a) to resolve a lesser-included case.[82] And it is fair. A jury should be no more allowed to settle on an undeserved, uncharged lesser than it should to acquit a defendant based on speculation as to the clear insufficiency of her conduct.[83]

II.B.2. "Clearly insufficient" to cause which harm?

Although the outcome is the same regardless of the answer, it should be noted that it is unclear what injury should be the focus of the analysis. The jury convicted

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[82] 55 S.W.3d 586, 590-91 (Tex. Crim. App. 2001) (defendant convicted of aggravated assault not entitled to lesser-included instruction on misdemeanor assault because there was no evidence "that hitting [the victim] with a full beer bottle was clearly insufficient to cause [the victim]'s fatal fall.").

[83] *See Cavazos v. State*, 382 S.W.3d 377, 385 (Tex. Crim. App. 2012) ("Meeting this threshold requires more than mere speculation—it requires affirmative evidence that both raises the lesser-included offense and rebuts or negates an element of the greater offense.").

appellant for recklessly causing serious bodily injury to J.D. by failing to protect J.D. from being grabbed, squeezed, or shaken by Justin or by failing to seek reasonable medical attention for J.D.[84] That is, the jury was asked to find one unidentified serious bodily injury. This record could have supported two: physical injury to J.D.'s eyes resulting in extensive blindness, and serious physical injury to the brain causing impairment.[85] The State appears to have considered the serious bodily injury to be J.D.'s overall diminished condition after surgical stabilization. Appellant treated "serious bodily injury" as a threshold to be crossed, and that Justin was responsible when that happened. Based on its disparate framing of the issue, it is unclear what result the court of appeals considered.[86] It is also not clear the jury was bound by

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[84] 1 CR 5.

[85] *See* TEX. PENAL CODE § 22.04(a)(1), (2). The State also alleged serious mental deficiency, impairment, or injury but the jury was not charged on it and it was not discussed by either party in closing argument. *Compare* 1 CR 5 (indictment) *with* 1 CR 92-95 (jury charge). The court of appeals says it was part of the conviction and mentions this alternative type of injury in its error analysis, *Cyr*, 2021 WL 746395, at *1, 4, but none of its reasoning hinges upon it.

In theory (and on a different record), it might be possible for a medical expert to quantify which brain injury or mental deficiencies were caused by the act of shaking and which were caused by lack of oxygen for 18 hours without any medical treatment. Had there been multiple injuries alleged, an issue might be whether more than one assaultive conviction arising out of an assaultive episode is permitted. That issue remained unresolved following *Ortiz v. State*, 623 S.W.3d 804 (Tex. Crim. App. 2021) (holding the gravamen of occlusion assault is the statutorily specified injury but not settling the unit of prosecution for assault). Whether a conviction can be had for both bodily and mental injuries arising out of the same assault was recently granted review. *Nawaz v. State*, PD-0408-21 (granted October 6, 2021).

[86] *Compare Cyr*, 2021 WL 746395, at *4 ("Therefore, whether Appellant was entitled to a jury instruction on concurrent causes depends on whether there was some evidence that Appellant's conduct was clearly insufficient to cause J.D.'s injuries."), *with id*. at *4 ("Viewed in the light most (continued...)

either view. It could have rationally decided that any of the discrete injuries in evidence satisfied the definition of serious bodily injury. Which they picked would change how this issue is framed.

If the jury considered J.D.'s ultimate impaired condition as a single serious bodily injury, the operative question on entitlement might be whether there is some evidence appellant's failure to obtain medical care was clearly insufficient to cause *all* of J.D.'s injuries.[87] If, at the other end of the spectrum, the jury could have focused on any of the discrete serious bodily injuries sustained, the operative question for entitlement is whether there is some evidence appellant's failure to obtain medical care was clearly insufficient to cause *any* serious bodily injury. That's a big difference. Fortunately, it need not be reached in this case because, as discussed next, there was no evidence to support either.

II.B.3. The record contains no affirmative evidence appellant's conduct was clearly insufficient to cause serious bodily injury.

Although quoting statutory language is not required, no one asked a question anything like whether an 18-hour delay in seeking medical care after traumatic abuse

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[86](...continued)
favorable to Appellant, the record contains some evidence that Appellant's conduct was clearly insufficient to result in serious bodily injury[.]"). The possibility that court considered the injury to be the sum of J.D.'s injuries rather than discrete additional serious bodily injury is curious given its reliance on its *Wright* opinion.

[87] This would jibe with the court of appeals's approach of treating this case like a standalone medical care case.

was clearly insufficient to cause all or any of J.D.'s serious bodily injury. The court of appeals focused on Dr. Patterson's "possible" statements to support entitlement. Again, Dr. Patterson said that, with earlier medical care, it was possible the swelling could have been stopped, possible the cumulative injury could have been lessened, and possible some of the injuries or affects could have been mitigated. Implicit in these answers is the opposite—it is possible that earlier medical care would not have stopped swelling, lessened cumulative injury, or mitigated injuries or affects. But that is not what entitlement to a concurrent causation instruction requires. Implicitly saying the defendant's conduct possibly did not contribute to the J.D.'s condition is not the same as saying that conduct was clearly insufficient in the abstract to cause it. Just as "mere possibility" is not the same as "probability,"[88] "possibly not" is not the same as "clearly incapable of." It may give a juror reason to disbelieve that same doctor's consistent testimony on the mechanism of J.D.'s injury, but that is a distinct inquiry from whether a trial judge is obligated to give what is effectively a sanctioned comment on the weight of the evidence.

None of the relevant testimony unmentioned by the court of appeals supports entitlement, either. Dr. Patterson's agreement with defense counsel that Justin's conduct alone caused serious bodily injury does not lend itself to a jury finding that

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[88] *Murphy v. State*, 112 S.W.3d 592, 600 (Tex. Crim. App. 2003) (discussing future dangerousness finding).

appellant's failure to seek medical care was clearly insufficient to cause it (or any). And, in context, her statements that Justin caused "the injury" or "the condition" appear to refer to why J.D. needed medical treatment, not whether extended delay is insufficient to cause serious bodily injury. Context is important.[89] The defense's central point was not that no additional harm befell J.D. because of the delay. It was that Justin's conduct was the greatest cause of J.D.'s injury and that J.D. would still have suffered serious bodily injury regardless of how quickly she received medical care.[90]

From all the evidence, it appears an 18-hour delay in seeking medical care is clearly sufficient to cause serious bodily injury due to increased (or at least prolonged) cranial swelling and attendant pressure causing both pain and brain cell death through lack of oxygen. All the affirmative medical evidence suggests the pressure buildup and resulting lack of oxygen to the brain over time contributed to J.D.'s resulting state. Appellant's observations of J.D.'s increased signs of trauma over time suggest additional injury. Every expert asked would have administered oxygen as quickly as possible, and brain surgery was performed immediately upon

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[89] *Ramos v. State*, 865 S.W.2d 463, 465 (Tex. Crim. App. 1993) (when determining entitlement to a lesser-included offense, defendant's testimony must be viewed in light of his factual theory of the case); *Godsey v. State*, 719 S.W.2d 578, 584 (Tex. Crim. App. 1986) (a "statement cannot be plucked out of the record and examined in a vacuum" when determining entitlement to a lesser-included offense).

[90] 4 RR 96-98.

arrival at the hospital. Although there was medical expert testimony exhibiting a reluctance to quantify the amount of pressure and therefore injury suffered from delay, there was nothing remotely like a statement that extended delay cannot cause serious bodily injury. The trial court was right to deny the requested instruction.

III. Conclusion

By finding appellant was entitled to an instruction on concurrent causation, the court of appeals did more than take testimony out of context. It unintentionally created a scheme that allows parents and other people with a duty to protect children to escape responsibility when the thing those children need protection from is other people. That is bad policy and bad law. It should be rejected.

PRAYER FOR RELIEF

WHEREFORE, the State of Texas prays that the Court of Criminal Appeals reverse the judgment of the Court of Appeals, hold that concurrent causation is inapplicable as matter of law and was not raised on this record, and remand the case for consideration of appellant's remaining sufficiency claim.

Respectfully submitted,

/s/ John R. Messinger

JOHN R. MESSINGER
Assistant State Prosecuting Attorney
Bar I.D. No. 24053705

P.O. Box 13046
Austin, Texas 78711
information@spa.texas.gov
512/463-1660 (Telephone)
512/463-5724 (Fax)

CERTIFICATE OF COMPLIANCE

The undersigned certifies that according to the WordPerfect word count tool this document contains 6,491 words.

/s/ John R. Messinger
John R. Messinger
Assistant State Prosecuting Attorney

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on this 1st day of November, 2021, the State's Brief on the Merits has been eFiled and electronically served on the following:

Philip Mack Furlow, District Attorney
106th Judicial District of Texas
609 North 1st St.
Lamesa, Texas 79331
philip.mack.furlow@co.dawson.tx.us

Paul E. Mansur
114 S. Main St.
Seminole, TX 79360
paul@paulmansurlaw.com

/s/ John R. Messinger
John R. Messinger
Assistant State Prosecuting Attorney

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Stacey Soule on behalf of John Messinger
Bar No. 24053705
information@spa.texas.gov
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Associated Case Party: DannaPresleyCyr

Name	BarNumber	Email	TimestampSubmitted	Status
Paul E.Mansur		paul@paulmansurlaw.com	11/1/2021 4:32:02 PM	SENT
Rose Burciaga		rose@paulmansurlaw.com	11/1/2021 4:32:02 PM	SENT
Office Mansur		office@paulmansurlaw.com	11/1/2021 4:32:02 PM	SENT

Case Contacts

Name	BarNumber	Email	TimestampSubmitted	Status
Philip MackFurlow		philip.mack.furlow@co.dawson.tx.us	11/1/2021 4:32:02 PM	SENT
Paul E.Mansur		paul@paulmansurlaw.com	11/1/2021 4:32:02 PM	SENT